

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
OF THE STATE OF WASHINGTON

IN THE MATTER OF
FRIENDS OF THE EARTH, STOP TOXIC
OVERSPRAY OF PESTICIDES, SEATTLE
AUDUBON SOCIETY and WASHINGTON
ENVIRONMENTAL COUNCIL,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT
OF ECOLOGY and A-1 SPRAY
SERVICE, INC.,

Respondents,

CITY OF SEATTLE,

Intervenors.

PCHB No. 79-86

ORDER GRANTING MOTION
TO DISMISS

This matter came before the Pollution Control Hearings Board, Nat W. Washington, Chairman, Chris Smith and David Akana (presiding) at a hearing on motions brought by the parties on January 11, 1980, in Lacey, Washington.

Appellants were represented by their attorney, Charles E. Ehlert; respondent Department of Ecology was represented by Charles W. Lean, Assistant Attorney General; respondent A-1 Spray Service, Inc., was represented by its attorney, Robert Backstein. The City of Seattle did not appear.

1 Three motions were filed and heard: respondent Department of
2 Ecology's Motion to Dismiss on the ground of mootness, appellant's
3 Motion to Compel Discovery, and appellant's Motion for Summary
4 Judgment.

5 This matter is an appeal of an order (DE 79-316) issued by the
6 respondent Department of Ecology (DOE) on June 1, 1979, which
7 temporarily modified the water quality criteria specified in
8 WAC 173-201-045(5)(c)(vii) under certain conditions for a period
9 beginning on June 15, 1979, and ending on September 30, 1979, for the
10 purpose of applying certain herbicides (Aquathol, Aquathol K, and
11 Aquakleen) in approximately 175 acres of Lake Washington.

12 An order staying the DOE's order during the pendency of the
3 hearing on appellant's motion for a stay and decision thereon was
14 issued by this Board on June 15, 1979. The hearing on the motion for
15 stay was thereafter held on June 15, 18, 19, 22, and 28, 1979, after
16 which a majority of this Board denied the motion on June 29, 1979.
17 Appellants sought further review in Thurston County Superior Court.

18 On September 6, 1979, the Board scheduled a pre-hearing conference
19 and hearing on the merits of the matter. A pre-hearing conference was
20 conducted on November 28, 1979, at which time a date for hearing of
21 motions was scheduled.

22 The DOE now moves to dismiss the appeal as moot on the ground that
23 the appealed order authorizes activities beginning June 15, 1979, and
24 ending on September 30, 1979, and because nothing further can occur
25 under the order, there is no longer a present controversy.

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1 "A moot case is one which seeks to determine an abstract question
2 which does not arise upon existing facts or rights." Black's Law
3 Dictionary (4th ed.) p. 1159. See Hansen v. West Coast Wholesale Drug
4 Co., 47 Wn.2d 825, 827 (1955). "Where a controversy between the
5 parties to an action has terminated prior to the time of trial, the
6 question becomes moot" Lewis - Pacific Dairymen's Assn v.
7 Price Frame, 126 Wash. 493, 495 (1923).

8 The DOE order (DE 79-316) has expired of its own terms and no
9 further activities pursuant to such order can be undertaken. The case
10 has become moot.

11 Sorenson v. City of Bellingham, 80 Wn.2d 547 (1972), cited by both
12 appellants and DOE, states the general rule regarding moot cases:

13 "It is a general rule that, where only moot questions or abstract
14 propositions are involved, or where the substantial questions
15 involved in the trial court no longer exist, the appeal, or writ
16 of error, should be dismissed. There is an exception to the above
17 stated proposition. The Supreme Court may in its discretion,
retain and decide an appeal which has otherwise become moot, when
it can be said that matters of continuing and substantial public
interest are involved."

18 Sorenson, supra, at p. 558. See also Ackerly Communications v.
19 Seattle, 92 Wn.2d 905 (1979).

20 The Supreme Court and the Court of Appeals through their inherent
21 judicial power may in their discretion retain and decide an appeal
22 which has otherwise become moot when matters of continuing substantial
23 public interest are involved. The Pollution Control Hearings Board is
24 a creature of statute and the discretionary power to hear and render a
25 decision on a moot case has not been granted by statute nor is this
power necessarily implied.

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1 In each of the cases called to our attention by the appellants,
2 the controversy became moot after the case had been heard on its
3 merits and while it was pending before the Supreme Court or the Court
4 of Appeals. This case became moot on September 30, before it had been
5 heard on its merits.

6 The theory behind allowing an appellate court, in its discretion,
7 to render a decision in a case which has become moot is set forth in
8 Leonard v. Bothell, 87 Wn.2d 847, 849 (1976):

9 We consider the following criteria to determine whether to
10 hear such as case:

11 [1] the public nature of the question presented, [2] the
12 desirability of an authoritative determination for the
future guidance of public officers, and [3] the likelihood
of future recurrence of the question. (Emphasis added.)

13 A key element is that there be an authoritative determination. In
14 our state only the Supreme Court or the Court of Appeals may render an
15 authoritative decision. An authoritative decision cannot be rendered
16 in this matter by the Pollution Control Hearings Board and further
17 proceedings herein should be terminated.

18 We note that the regulatory procedure used by the Department of
19 Ecology lacks an automatic stay provision pending hearing of an appeal
20 by the Board. In retrospect, a hearing on the merits of an appealed
21 decision, such as the instant order, should be expedited while
22 preserving the status quo until a final decision has been reached. In
23 this manner the merits of the case would be decided before the
24 passage of time mooted the issues raised, at least as before this
25 Board.

1 Respondent's motion to dismiss should be granted. Because
2 our conclusion is dispositive of this case, we do not address
3 appellant's motions. NOW THEREFORE,

4 IT IS ORDERED that respondent's Motion to Dismiss is granted
5 and the appeal is dismissed.

6 DATED this 31~~st~~ day of January, 1980.

7 POLLUTION CONTROL HEARINGS BOARD

8 
9 NAT W. WASHINGTON, Chairman

10 
11 CHRIS SMITH, Member

12 
13 DAVID AKANA, Member